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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1330

K. O. SIBLEY, ET AL
Petitioners

versus

RURAL ELECTRIFICATION ADMINISTRATION, ET AL,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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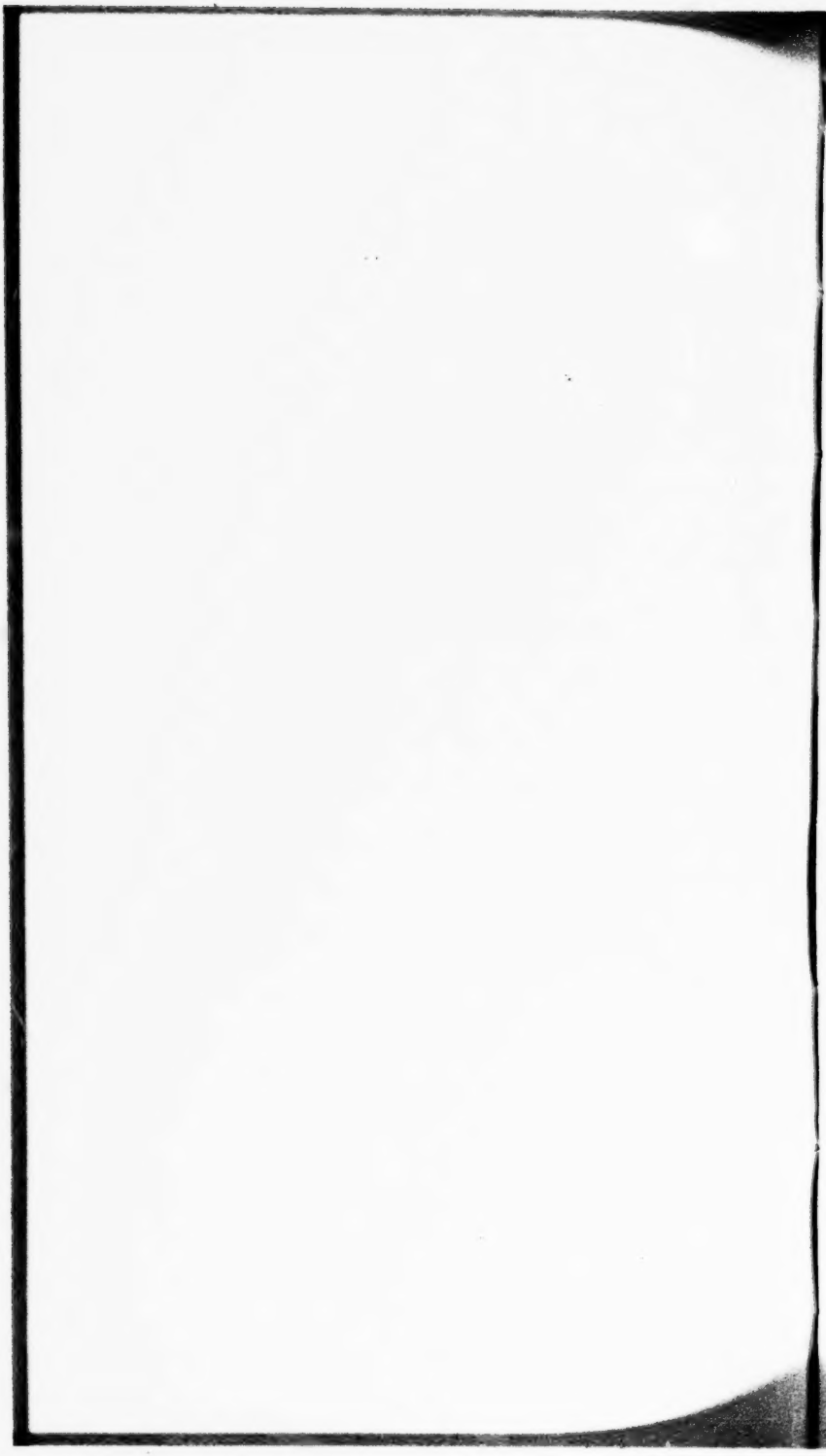

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PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, K. O. Sibley and 14 other members of Dixie Electric Membership Corporation, suing on behalf of Dixie Electric Membership Corporation and on behalf of its subsidiary corporation, Louisiana Electric Cooperative, Inc., and on behalf of all other members of Dixie Electric Membership Corporation, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered in the above entitled case on November 19, 1969.

OPINIONS BELOW

The opinion of the district court which has not been reported is in the record (R. 224) and is appended hereto. (Appendix B, infra, p. 24). The opinion of the Court of Appeal is reported at 419 F. 2d 384 and is appended hereto with its order denying petitioners' motion for rehearing. (Appendix B, infra. p. 23).

JURISDICTION

The judgment of the Court of Appeals was entered on November 10, 1969. Application for rehearing was filed on November 24, 1969, and rehearing was denied on December 18, 1969. (Appendix B, infra. p. 24). The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Does the Federal District Court have jurisdiction to review the actions of an administrative official which were allegedly carried out in violation of an act of Congress and an administrative regulation which he was bound to follow?

2. Do members of a corporate entity have legal standing to bring a derivative action on behalf of the corporation seeking to have illegal action and invalid contracts entered into by the corporation set aside, or to prevent its assets from being wasted?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The constitutional provision involved is Article 3, Sec. 2, of the United States Constitution. The statutes involved are

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Secs. 4 and 13 of the Rural Electrification Act of 1936, as amended, 7 U.S.C. 904, 913; Sec. 1 of the Sherman Antitrust Act, as amended, 15 U.S.C. 1; Sec. 10 of the Administrative Procedure Act, 5 U.S.C. 1009; Sec. 3 of the Clayton Act, 15 U.S.C. 14; Article 19, Sec. 14, as amended, Louisiana Constitution of 1921; La. R.S. 51:122-124. The regulation involved is REA Bulletin 111-3, 29 Fed. Reg. 2765 (1964). They are printed at Appendix A, infra, p. 10.

STATEMENT OF THE CASE

1. Jurisdiction in the District Court

This action was filed in the district court by K. O. Sibley and other consumer-members of Dixie Electric Membership Corporation against the Rural Electrification Administration, its Administrator, the United States Department of Agriculture and its Secretary, Dixie Electric Membership Corporation and Louisiana Electric Cooperative, Inc. The matter in controversy exceeds $10,000 in value, and the case arises under the Constitution and laws of the United States. The jurisdiction of the district court was invoked under 28 U.S.C. 1331 and 28 U.S.C. 1361.

2. Proceedings in the Court Below and Facts Material to the Questions Presented.

This is a suit to have a contract declared invalid. The contract is a loan agreement between the cooperatives and the Rural Electrification Administration. The derivative action brought by plaintiffs on behalf of the cooperative of which they are members challenges (a) the legality of a $56,521,000 loan applied for and obtained by Louisiana Electric Coopera-

tive, Inc., under the Rural Electrification Act (7 U.S.C. 904) and administrative regulations promulgated thereunder (R.E.A. Bulletin 111-3), and (b) the validity of power contracts between Dixie Electric and Louisiana Electric which were required by the Administrator as security for the loan to Louisiana Electric Cooperativefi Inc., and contend (c) that the whole arrangement amounts to a improvident business venture which is detrimental to Dixie Electric; results in a waste of its assets, and is one which serves interests other than those of the distribution borrower.

The status of the plaintiffs as members of the cooperative on whose behalf the derivative action is brought was not challenged. Their right to represent the organization was conceded. (R. 101.)

The loan agreement under attack provides for the loan of $56,521,000 to Louisiana Electric for construction of a generation and transmission system. (R. 53, 54) It is alleged, and there is evidence to establish, that the effectiveness of the system to be constructed depends upon a contractual arrangement with private industry and municipalities (R. 19, 55) and that the loan is secured in whole or in part by an obligation of Dixie Electric and the other member cooperatives to purchase all of their electrical requirements from Louisiana Electric for a period of at least 35 years. (R. 7)

It is alleged, and there is evidence to establish, that the 35-year exclusive dealing contract will not provide power to Dixie Electric as cheaply as it is available from other sources, and that the reliability of service is subject to serious question. (R. 143-149)

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Preliminary injunction applied for in the district court was denied and motion to dismiss on the grounds that the court lacked jurisdiction over the subject matter of the suit and that the petitioners did not have standing to sue, were filed by respondents. The motion to dismiss was maintained and petitioners appealed to the Fifth Circuit.

The Fifth Circuit maintained the judgment of the district court.

REASONS FOR GRANTING THE WRIT

1. The holding below that the contracts of the Administrator of the Rural Electrification Administration and his loan approval authority are not reviewable by the courts conflicts with the principles established by the decisions of this court in *Barlow v. Collins*, No. 249 October Term 1969, 38 L.W. 4195, and *Association of Data Processing Service Organizations, Inc. v. Camp, Comptroller of the Currency*, 85 October Term 1969, 38 L.W. 4193.

The Fifth Circuit concluded its opinion in *Barlow v. Collins*, saying:

> "As we concluded in REA v. Central La. Elec. Co., supra at 865, this case is one where however outrageous or unfair appellants consider the effects of this regulation, their remedy lies not in the Court but in Congress." 398 F. 2d 398, at p. 402 (1968).

In reversing, this court reaffirmed with force and clarity the principle that judicial review is favored and will be accorded to persons aggrieved in the absence of "clear and convincing evidence of a contrary legislative intent."

Where there is clear congressional intent to benefit or protect the interest of a class, this court's holding in *Barlow v. Collins* indicates that members of that class may have judicial review unless the command of the statute precludes such review. The Rural Electrification Act does not expressly preclude review and there can be no question that Congress conferred the benefit of that Act upon Rural Electric Cooperatives and their consumer-members. The power supply survey required under REA Bulletin 111-3, and which petitioners contend was not conducted as a condition precedent to the making of the loan here, has as its principal function the institution of advantageous power supply contracts for Rural Electric Cooperatives.

This is a case where the objectives of the statute will be denied the beneficiaries thereof unless the right to judicial review is recognized to exist.

2. The decision of the court below denying standing to petitioners is in direct conflict with the decision of this court in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, and is contrary to principles set forth in *Barlow v. Collins*, supra and *Association of Data Processing Service Organizations, Inc. v. Camp, Comptroller of the Currency*, supra.

In *Ashwander*, the standing of preferred shareholders to bring a derivative action contesting the legality of a contract between the corporation in which they held shares and the Tennessee Valley Authority was recognized.

The standing of the member-consumers here to contest legality of a contract between the cooperative which they represent and another government agency was denied by the

court below. The status of the parties is the same and the situation here may well be identical to that which prompted the remark of the court in *Ashwander* that:

> "Thus, the breach of duty may consist in yielding, without appropriate resistance, to governmental demands which are without warrant of law or are in violation of constitutional restrictions." 297 U.S. at 318.

In *Barlow v. Collins* and *Association of Data Processing Service Organizations, Inc. v. Camp*, "standing to sue" was brought back into the context of Article 3 of the Constitution. In doing so, this court established as requisites to standing: (1) injury in fact; (2) a "case and controversy" subject to being presented in an adversary context and in a form historically viewed as entitled to judicial resolution; and (3) a protectible interest under the relevant statute. Petitioners here meet all three tests. Their allegations, which are supported by evidence, show economic injury. The action is one to test the validity of a contract; and is in an adversary context; and in a form susceptible of judicial resolution. The Rural Electrification Act, the relevant statute, was enacted as an expression of Congressional intent to benefit and protect consumer-members and their electrical cooperatives.

Petitioners here clearly fall within the principle which ordained that the tenant farmers in *Barlow v. Collins* had a protectible interest.

3. A review of the questions presented is of vital importance to the beneficiaries of the Rural Electrification Act and the administration of that statute in accordance with the objectives of Congress.

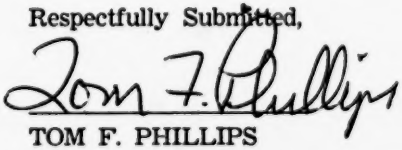
Immunity from judicial review gives rise to administrative absolutism. Administrative absolutism tends to spawn bureaucratic autocracy which is encouraged to operate without regard to the objectives of Congress and the interest of the affected public. A statement by a court that "regardless of how outrageous or unfair the making of this loan may seem, the remedy is not in the courts but in the Congress" is totally inconsonant with the rationale of *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 135, which is expressed in the following language:

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.
>
> • • •
>
> "The government of the United States has been emphatically termed as a government of laws and not men. It will cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right." (2 L. Ed. at p. 162)

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted and the judgment of the court below should be reversed.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, Tom F. Phillips, one of the attorneys for petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of March, 1970, I served copies of this petition for certiorari on the respondents named therein by depositing the same in the United States Post Office, with airmail postage prepaid, addressed to the following parties:

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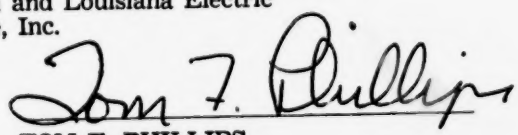

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APPENDIX A

U.S. Const. Article 3, Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTIONS 4 AND 13 OF THE RURAL ELECTRIFICATION ACTS OF 1936, AS AMENDED:

4. The Administrator is authorized and empowered, from the sums hereinbefore authorized, to make loans for rural

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electrification to persons, corporations, States, Territories, and subdivisions and agencies thereof, municipalities, peoples' utility districts and cooperative, nonprofit, or limited-dividend associations, organized under the laws of any State or Territory of the United States, for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service, and loans, from funds available under the provisions of sections 903(d) and 903(e) of this title but without regard to the 25 per centum limitation therein contained, to cooperative associations and municipalities for the purpose of enabling said cooperative associations and municipalities to the extent that such indebtedness was incurred with respect to electric transmission and distribution lines or systems or portions thereof serving persons in rural areas, to discharge or refinance long-term debts owed by them to the Tennessee Valley Authority on account of loans made or credit extended under the terms of the Tennessee Valley Authority Act of 1933, as amended: *Provided*, That the Administrator, in making such loans, shall give preference to States, Territories, and subdivisions and agencies thereof, municipalities, peoples' utility districts, and cooperative, nonprofit, or limited-dividend associations, the projects of which comply with the requirements of this chapter. Such loans shall be on such terms and conditions relating to the expenditure of the moneys loaned and the security therefor as the Administrator shall determine and may be made payable in whole or in part out of the income: *Provided, further*, That all such loans shall be self-liquidating within a period of not to exceed thirty-five years, and shall bear interest at the rate of 2 per centum per annum; interest rates on the unmatured and

unpaid balance of any loans made pursuant to this section prior to September 21, 1944, shall be adjusted to 2 per centum per annum, and the maturity date of any such loans may be readjusted to occur at a date not beyond thirty-five years from the date of such loan: *And provided further*, That no loan for the construction, operation, or enlargement of any generating plant shall be made unless the consent of the State authority having jurisdiction in the premises is first obtained. Loans under this section and section 905 of this title shall not be made unless the Administrator finds and certifies that in his judgment the security therefor is reasonably adequate and such loan will be repaid within the time agreed. May 20, 1936, c. 432, Title I, § 4, 49 Stat. 1365; Sept. 21, 1944, c. 412, Title V, §§ 502(a), 503, 58 Stat. 739; Dec. 23, 1944, c. 725, 58 Stat. 925; June 29, 1948, c. 703, 62 Stat. 1070; Oct. 28, 1949, c. 776, §§ 2, 4(e), 63 Stat. 948; June 15, 1955, c. 139, § 2, 69 Stat. 132; 7 U.S.C. 904.

13. As used in this chapter the term "rural area" shall be deemed to mean any area of the United States not included within the boundaries of any city, village, or borough having a population in excess of fifteen hundred inhabitants, and such term shall be deemed to include both the farm and nonfarm population thereof; the term "farm" shall be deemed to mean a farm as defined in the publications of the Bureau of the Census; the term "person" shall be deemed to mean any natural person, firm, corporation, or association; the term "Territory" shall be deemed to include any insular possession of the United States. May 20, 1936, c. 432, Title I § 13, 49 Stat. 1367; Oct. 28, 1949, c. 776, § 2, 63 Stat. 948; 7 U.S.C. 913.

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SECTION 10 OF THE ADMINISTRATIVE PROCEDURE ACT:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

Rights of review

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and venue of proceedings

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts reviewable

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise ex-

pressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

Relief pending review

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

Scope of review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statu-

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tory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. June 11, 1946, c. 324, § 10, 60 Stat. 243; 5 U.S.C. 1009.

SECTION 1 OF THE SHERMAN ANTITRUST ACT, AS AMENDED:

Every contract, combination in the form or trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in section 1-7 of this title shall render illegal contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall

not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890. c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282; 15 U.S.C. 1.

SECTION 3 OF THE CLAYTON ACT:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract

for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Oct. 15, 1914, c. 323, § 3, 38 Stat. 731; 15 U.S.C. 14.

LA. R.S. 51:122:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in this state is illegal.

Whoever violates this Section shall be fined not more than five thousand dollars, or imprisoned, with or without hard labor, not more than three years, or both.

LA. R.S. 51:123:

No person shall monopolize, or attempt to monopolize, or combine, or conspire with any other person to monopolize any part of the trade or commerce within this state.

Whoever violates this section shall be fined not more than five thousand dollars, or imprisoned, with or without hard labor, not more than three years, or both.

LA R.S. 51:124:

No person engaged in commerce shall, in the course of such commerce, lease, sell, or contract for the sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within this state, or fix a price, discount, or rebate on the condition, agreement, or understanding that the purchaser or lessee shall not use or deal in the goods, wares, mer-

chandise, machinery, or other commodities of a competitor of the vendor or lessor, where the effect of the sale, contract for sale, or lease, or the condition, agreement, or understanding is to substantially lessen competition or tends to create a monopoly in any line of commerce.

REA BULLETIN 111-3. 29 FED. REG. 2765 (1964):

UNITED STATES DEPARTMENT OF AGRICULTURE

Rural Electrification Administration

February 24, 1964

REA BULLETIN 111-3

SUBJECT: Power Supply Surveys

I. **Purpose:** This bulletin sets forth REA policy with regard to power supply surveys and certifications thereto by the Administrator in relation to the approval of loans for generation or transmission facilities.

II. **General:** The terms and conditions of power supply arrangements are major and critical factors in the ability of REA borrowers to carry forward the rural electrification program. REA has the responsibility to assist borrowers in achieving the most advantageous power supply arrangements to accomplish the objectives of the Rural Electrification Act and, without prejudice to the accomplishment of these objectives to conserve REA loan funds. REA will undertake power supply surveys to assure adequate review of existing and proposed power supply alternatives and to encourage closer cooperation between REA borrowers and other electric power suppliers.

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III. **Policy:**

A. **Requests for Power Supply Surveys:** Any REA borrower or potential borrower may request REA to make a survey of any specific power supply problem or its power supply needs. Such request shall provide a full description of existing power supply contracts and arrangements, a statement of any special problems and a general summary of power supply needs, copies of any proposals made by existing or other suppliers, and a summary of negotiations pertaining to current or anticipated problems and needs. Distribution-type systems should submit such request and information to the area office; power-type systems should submit such request and information to the Power Supply Division.

B. **Conduct of Survey:** If the Administrator determines to undertake the requested power supply survey, the survey shall be so conducted as to provide an adequate review of the applicant's power supply problems and needs, existing or proposed power supply arrangements, if any, and such other potential power supply arrangements which, in the judgment of the Administrator, may contribute to the solution of those problems and needs. Where the Administrator finds existing or proposed contracts with power suppliers are unreasonable for purposes of the Rural Electrification Act, the supplier under such contracts or proposals will be advised wherein they are unreasonable, and REA will endeavor to have the contracts or proposals made reasonable. The REA borrower or potential borrower shall be made a party to any negotiations between REA and such power supplier. When necessary to avoid dilatory tactics or protracted delays, the Administrator shall advise the parties in such cases of a definite time limit for negotiations

under the survey and a final cut-off date for all proposals which are to be considered in evaluation of loan applications related to the problems and needs covered by the survey.

C. **Requirement for Consideration of Loan Application:** No loans for generation or transmission facilities will be made until a power supply survey has been completed by REA. No application for financing of generation or transmission facilities requiring a loan for either or both in an amount of more than $2 million will be accepted for consideration by REA unless (a) a power supply survey has been completed, or (b) it is determined by the Administrator that completion of the survey requires full review of proposed REA-financed generation or transmission facilities.

D. **Certification of Loans for Generation or Transmission:** No loan for generation or transmission facilities will be made except in compliance with Bulletin 20-6, "Loans for Generation and Transmission," dated May 31, 1961, and upon certification by the Administrator to the Secretary of Agriculture that the loan has been approved after the completion of a power supply survey which shows that the loan is (a) needed to construct facilities to implement an existing contract or a proposed contract with the existing power supplier; or (b) needed to provide facilities or service for which there is no existing or proposed contract from any other power supplier; or (c) needed because existing and proposed contracts to provide the facilities or service to be financed were found to be unreasonable, each supplier involved was so advised, REA attempted to have such contracts made reasonable, and the existing or other proposed suppliers had failed or refused to do so within the time set by the Administrator. Loans for generation or transmission facilities

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of more than $2 million shall be similarly certified to the Comptroller General. They shall also be certified to the Senate and the House of Representatives of the United States, as directed by the respective bodies. Certification of each generation or transmission loan in excess of $2 million shall be accompanied by the following information:

1. The name and address of the applicant borrower and the date of the application.

2. Description and estimated cost of the proposed generation facilities. Indicate if the proposed facilities are the initial or additional unit or units of a plant comprised of one or more units.

3. Description and estimated cost of proposed transmission facilities, including any immediate or future plans to interconnect with other transmission systems.

4. Description of any long-range plans the applicant may have for construction of additional generation and transmission facilities and the estimated cost of the planned facilities.

5. Comparison of the estimated costs of generation by the applicant borrower with the cost of power available from existing supplies, including the final offer by the private supplier including terms and conditions he offered to meet applicant's long-term energy needs.

6. Summary of the efforts made by the applicant and by REA to obtain the applicant's power and energy requirements from existing power suppliers and the reason why such efforts have not been successful.

7. Explanation of the applicant's reasons for seeking an REA loan.

8. The amount of electric energy which the applicant will cease to purchase from present power suppliers upon construction of the generating plant for which REA financing is being sought.

9. Explanation of the extent to which the feasibility of the requested loan for generation and transmission facilities depends upon the use of a portion of the facilities by others (including Federal power marketing agencies).

10. Details of the applicant's plans to sell or otherwise make available any of the power and energy from the proposed generation facilities to others (including Federal power marketing agencies).

11. Names of State agencies and commissions having jurisdiction over the applicant borrowers.

Norman M. Clapp
Administrator

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APPENDIX B

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(November 10, 1969)

Before THORNBERRY, MORGAN and CARSWELL, Circuit Judges.

PER CURIAM:

This is the third attempt to enjoin the consummation of a Rural Electrification Administration Loan to the Louisiana Electric Cooperative. See Rural Electrification Administration v. Central Louisiana Electric Co., 354 F.2d 859 (5th Cir. 1966), certiorari denied 385 U.S. 815, 87 S.Ct. 34, 17 L.Ed.2d 54.

[1] Despite this Court's previous explicit holding that private power companies themselves cannot enjoin as competitors the granting of a loan from the Rural Electrification Administration, appellants here seek to bar the loan as individual members of Louisiana Electric Cooperative, Inc., which is itself the beneficiary of the subject loan.

[2] The effect of our holding in Rural Electrification Administration v. Central Louisiana Electric Co., supra, cannot be so easily circumvented. There the Court specifically held that apart from the plaintiff's lack of standing, the Courts are without jurisdiction to review the Agency's loan-making authority. The holding has been reiterated in Alabama Power Co. v. Alabama Electric Co-operative, Inc., 394 F.2d 672 (5th

Cir. 1968), certiorari denied 393 U.S. 1000, 89 S.Ct. 488, 21 L.Ed.2d 465.

The district court's order of dismissal is accordingly

Affirmed.

OPINION OF DISTRICT COURT, WESTERN DISTRICT OF LOUISIANA, DISMISSING COMPLAINT

HUNTER, JUDGE:

ON MOTION FOR REHEARING

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING MOTION FOR REHEARING

December 18, 1969

Before THORNBERRY and MORGAN, Circuit Judges, and CARSWELL, District Judge.

PER CURIAM:

The appellant's motion for rehearing filed in the above styled and numbered cause is hereby

DENIED.

DISTRICT COURT RULING ON MOTION TO DISMISS

This is the third of a series of suits to enjoin the consummation of a $56,000,000 loan by the Rural Electrification Administration to Louisiana Electric Cooperative, Inc. The first was filed in October of 1964. There, certain power com-

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panies sought to annul the loan and to enjoin consummation of it, claiming, among other things, that it violated the purposes of the Rural Electrification Administration, REA Bulletin 111-3, and complainants' constitutional rights, and that the Administrator had incorrectly certified that no state agency or commission had jurisdiction over LEC within the requirement of 7 U.S.C.A. 904 requiring prior approval of loans by agencies or commissions having such jurisdiction. As reflected in the decision of the United States Fifth Circuit Court of Appeals, *Rural Electrification Administration v. Central Louisiana Electric Company*, 354 F. 2d 859 (1966) cert. denied, 385 U.S. 815, 838, Honorable Ben C. Dawkins, Jr. issued the injunction sought by complainant. In reversing, the Fifth Circuit held that federal courts do not have jurisdiction to review the grant or denial of loans by the Rural Electrification Administration, and that the power companies lacked standing to maintain the action.

In October of 1968 the same parties filed proceedings in Suit No. 14164 on the docket of this Court again seeking to enjoin consummation of the loan. Following a hearing on the application for a preliminary injunction, Judge Dawkins took the matter under advisement. On December 12, 1968, on application of the complaining parties, Judge Dawkins issued a temporary restraining order prohibiting release by REA of loan funds to LEC. The defendants sought relief from the United States Fifth Circuit Court of Appeals staying that order, or alternatively, for issuance of a writ of prohibition and/or mandamus having the same effect. On December 23, 1968, the Court of Appeals acted on the application after noting expiration of the order that day, and stated:

"Granting of a further temporary restraining order

by the District Court would, in our view, be improvident, since no immediate irreparable harm and damage has been made out by plaintiff. * * *"

Subsequently, on December 31, 1968, fourteen members of Dixie Electric Membership Corporation filed the instant proceeding, seeking to enjoin the REA loan on the same basis as had been contended for by the power companies in the two prior actions, Nos. 10552 and 14164. It is also contended that certain 35-year requirement contracts between Dixie and LEC for the purchase by Dixie of power from LES violate the anti-trust laws, and that certain contracts entered by LEC and others in furtherance of the realization of the LEC system were disadvantageous and damaging to Dixie and LEC. The petitioners are 14 of the 20,000 members of Dixie Electric. Judge Dawkins recused himself and the case was promptly referred to and heard by this Court.

In *Alabama Power Company v. Alabama Electric Cooperative*, 394 F. 2d 674 (C.A. 5, 1968), the Fifth Circuit held certain contracts between Alabama Electric Cooperative and distribution cooperatives to be within the statutory authority of the REA Administrator. The Court's analysis of the Administrator's authority, and its language in upholding the contract, is as applicable to the attack by plaintiffs here as it was in *Alabama Power*:

"* * * This is the first of the attacks by private companies on federal loans to competitors in which there has been a separate attack on the borrower and those alleged to be in conspiracy with it for claimed violation of the anti-trust laws. It is argued that there is nothing in the Act or in its legislative history which authorized the

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Administration to grant immunity to the borrower, AEC, and that at the very least the plaintiff has a right to pursue its anti-trust suit against AEC. That position, we think, is based upon too narrow a conception of the program authorized by Congress. The making of loans by the Administrator necessarily includes the existence and ability of borrowers to whom such loans can be made. If the security which the Administrator requires can be undercut and the borrower mulcted in treble damages for complying with the condition imposed by the Administrator for making the loan, then the functioning of the Act will be crippled, if not defeated. To avoid frustrating the intent of Congress, it must follow that in cases where the Administrator is immune from suit under the anti-trust laws, the borrower is likewise immune."

REA's insistence on 35-year all-requirement contracts as security for REA loans has been brought to the attention of Congress by REA.[1] Yet Congress has continued to make appropriations without the slightest indication of Congressional dissatisfaction with REA's imposition of 35-year all-requirement contracts.

Being of the opinion that plaintiffs could not ultimately prevail in the face of decisive appellate authority, we did on January 22, 1969, deny the request for a preliminary injunction. On the basis of that same authority, we sustain defendants' motions to dismiss.

Counsel for defendants should submit appropriate order.

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[1] See, for example, Hearings Before Agricultural Sub-committee, Department of Agriculture Appropriations for 1951, Senate Committee on Appropriations, 81st Congress.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, on this the 25th day of February, 1969.

/s/ Edwin F. Hunter, Jr.
UNITED STATES DISTRICT JUDGE

Filed
February 26, 1969

ORDER OF DISMISSAL

Defendants, having moved the Court to dismiss the within action, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, on grounds of judicial non-reviewability and because plaintiffs lack standing to maintain this suit, and the parties having agreed to submit said motion on the briefs already on file with the Court, and the Court being fully advised in the premises, it is;

ORDERED, That the Motions to Dismiss be and hereby are granted dismissing this action because there is no judicial review of the subject matter herein, and because plaintiffs lack standing to maintain this suit.

DATED: March 17, 1969.

Filed
March 18, 1969

/s/ Edwin F. Hunter, Jr.
UNITED STATES DISTRICT JUDGE